MOHAMED KANATHI MEERAH MYDIN v. PP

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEAL NO: P-05(M)-16-01-2018]
29 NOVEMBER 2018

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused convicted for offence of trafficking in dangerous drugs – Drugs found in car driven by accused with another passenger – Accused sentenced to death – Prosecution relied heavily on testimony of passenger – Whether passenger accomplice – Whether evidence needed to be corroborated – Whether conviction and sentence safe – Whether ought to be set aside – Dangerous Drugs Act 1952, s. 39B(1)(a)*

EVIDENCE: *Accomplice – Corroboration – Offence of trafficking in dangerous drugs – Drugs found in car driven by accused with another passenger – Prosecution relied heavily on testimony of passenger – Whether passenger accomplice – Whether evidence needed to be corroborated – Whether conviction based on uncorroborated evidence of accomplice safe – Evidence Act 1950, s. 114(b) – Dangerous Drugs Act 1952, s. 39B(1)(a)*

EVIDENCE: *Adverse inference – Non-production of material witness – Drugs found in car driven by accused with another passenger – Failure by prosecution to call witness that could confirm whether drugs belonged to accused or passenger – Whether detrimental to prosecution's case – Evidence Act 1950, s. 114(g) – Dangerous Drugs Act 1952, s. 39B(1)(a)*

Two police officers were carrying out anti-crime patrolling on their motorcycles when they spotted a car, occupied by two people behaving suspiciously, stopping. The police approached the car but the car sped off. The police chased after the car and, in the course, the car collided with another car. The car stopped and the police identified themselves as policemen to the two occupants, who were later identified as the appellant, the driver, and the front seat passenger ('PW1'). In the car, the police found a package wrapped with colored and decorative wrapping paper and bearing the words 'The best my friend'. The package contained dried plant materials which were later confirmed by the chemist to be 1,924g of cannabis. Investigations further revealed that the car was registered in the appellant's name. The appellant was charged, at the High Court, for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. PW1 was initially charged as co-accused but the prosecution withdrew the charge against him and asked for him to be discharged not amounting to an acquittal, pursuant to s. 254 of the Criminal Procedure Code. Subsequently, PW1 was called as a witness and he testified that (i) he went

into the appellant's car to collect 'duit panggu' (alms) in the amount of RM450 from the appellant; (ii) he did not bring anything when he entered the appellant's car and his friend, one Mohd Halim, who was with him before he entered the car, could confirm this; (iii) when he asked why the appellant sped off when the police approached them, the appellant said 'dalam kereta ada barang'; and (iv) he had no knowledge of the drugs found. Satisfied that the prosecution had proved a *prima facie* case, the appellant was called to enter his defence. In his defence, the appellant submitted that (i) PW1 asked for his help to hand over a birthday gift to the latter's friend; (ii) PW1 brought the package and placed it in the backseat of the car; (iii) he was an innocent carrier as he did not know the contents of the package; (iv) when the police approached them, PW1 alerted the appellant and ordered him to speed off; and (v) while being chased by police, the appellant tried to stop the car but was prevented by PW1, which resulted in the car losing control and, ultimately, colliding with another car. At the end of the defence case, the High Court Judge ('the HCJ') held that the appellant had not succeeded in raising a reasonable doubt on the prosecution's case. The appellant was convicted for the offence and sentenced to death. Hence, the present appeal against his conviction and sentence. The issue that arose for adjudication was the heavy reliance by the prosecution on the evidence of PW1. According to the appellant, PW1 was an accomplice and his evidence should be expunged.

Held (allowing appeal)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) PW1 was an accomplice and the evidence of an accomplice required corroboration. Under s. 114(b) of the Evidence Act 1950 ('EA'), the court may presume, until the contrary is proven, that an accomplice is unworthy of credit unless he is corroborated in material particulars. A conviction based on the evidence of an accomplice is not illegal but case laws have warned the dangers of a concocted story by an accomplice to throw the blame on the accused person. (paras 23, 24, 26 & 27)

(2) It was not safe to rely on PW1's evidence due to two infirmities in PW1's evidence. Firstly, in his testimony, PW1 testified that he entered the appellant's car just to collect 'duit panggu' from the appellant. If it was so, why the need for PW1 to get into the car and sit in the front seat and travel in the car with the appellant? Furthermore, the police never recovered the 'duit panggu' of RM450 either from the appellant nor the car. Secondly, PW1 testified that he was with Mohd Halim when he entered the appellant's car. It was incumbent upon the prosecution to have called Mohd Halim to the witness stand. The HCJ should have invoked adverse inference, under s. 114(g) of the EA, against the prosecution for the failure to call Mohd Halim. The HCJ erred, in law and in fact, when he prematurely decided that Mohd Halim's evidence

was irrelevant. Mohd Halim was a very important and relevant witness in determining the guilt of the appellant. If Mohd Halim was called, he would be able to say whether the package were in the hands of PW1 before he entered the car or otherwise. (paras 30-32 & 34-36)

(3) The HCJ committed an appealable error when His Lordship relied on the evidence of PW1 in convicting the appellant when PW1's evidence should be excluded from consideration or expunged. If PW1's evidence was excluded, the whole case of the prosecution would tumble and the charge against the appellant could not stand. The conviction was unsafe. Therefore, the conviction and sentence of the High Court were set aside and the appellant was acquitted and discharged. (paras 40, 42 & 45)

Bahasa Malaysia *Headnotes*

Dua orang pegawai polis sedang menjalankan rondaan anti-jenayah secara bermotosikal ketika mereka menjumpai sebuah kereta, dengan dua orang di dalamnya yang berkelakuan mencurigakan, sedang berhenti. Pihak polis mendekati kereta tersebut tetapi kereta tersebut memecut laju. Pihak polis mengejar kereta tersebut dan, semasa kejar-mengejar ini, kereta tersebut berlanggar dengan kereta lain. Kereta tersebut terhenti dan pihak polis memperkenalkan diri mereka kepada dua orang tersebut, yang kemudian dikenal pasti sebagai, perayu, iaitu si pemandu, dan penumpang yang duduk di tempat duduk hadapan ('PW1'). Di dalam kereta, pihak polis menjumpai sebuah bungkusan yang dibalut dengan kertas pembalut berwarna dan berhias dengan tertera perkataan-perkataan 'The best my friend'. Bungkusan ini mengandungi bahan tumbuhan kering yang kemudian disahkan oleh ahli kimia sebagai 1,924g kanabis. Siasatan seterusnya mendedahkan kereta tersebut berdaftar atas nama perayu. Perayu dituduh di Mahkamah Tinggi kerana mengedar dadah berbahaya, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Pada asalnya, PW1 dituduh sebagai tertuduh bersama tetapi pihak pendakwaan menarik balik tuduhan terhadapnya dan memohon agar dia dilepaskan tanpa terjumlah sebagai pembebasan, bawah s. 254 Kanun Tatacara Jenayah. Berikutan itu, PW1 dipanggil sebagai saksi dan dia memberi keterangan (i) dia masuk ke dalam kereta untuk mengutip 'duit panggu' (derma) berjumlah RM450 daripada perayu; (ii) dia tidak membawa apa-apa semasa memasuki kereta perayu dan rakannya, seorang bernama Mohd Halim, yang berada bersama-sama dengannya sebelum dia memasuki kereta tersebut, boleh mengesahkan hal ini; (iii) apabila dia bertanya kenapa perayu memecut laju ketika didekati pihak polis, perayu berkata 'dalam kereta ada barang'; dan (iv) dia tidak tahu tentang dadah yang ditemui. Berpuas hati pihak pendakwaan berjaya membuktikan satu kes *prima facie*, perayu dipanggil membela diri. Dalam pembelaannya, perayu menyatakan (i) PW1 meminta pertolongannya untuk menyerahkan hadiah hari lahir kepada rakan PW1; (ii) PW1 membawa bungkusan tersebut dan meletakkannya di tempat duduk belakang kereta; (iii) dia seorang pembawa

A tidak bersalah kerana dia tidak tahu tentang kandungan bungkusan tersebut; dan (iv) apabila pihak polis mendekati mereka, PW1 memberitahu perayu dan mengarahkannya memecut laju. Pada penutup kes pembelaan, Hakim Mahkamah Tinggi ('HMT') memutuskan perayu gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Perayu disabitkan atas B kesalahan dan dijatuhkan hukuman mati. Maka timbul rayuan ini terhadap sabitan dan hukumannya. Isu yang timbul untuk diputuskan ialah pergantungan kuat oleh pihak pendakwaan terhadap keterangan PW1. Menurut perayu, PW1 ialah rakan sejenayah dan keterangannya harus dipotong.

C **Diputuskan (membenarkan rayuan)**
Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) PW1 ialah rakan sejenayah dan keterangan seorang rakan sejenayah memerlukan sokongan. Bawah s. 114(b) Akta Keterangan 1950 ('AK'), mahkamah boleh menganggap, hingga dibuktikan sebaliknya, seorang D rakan sejenayah tidak berwibawa kecuali jika dia disokong oleh butir-butir material. Satu sabitan berdasarkan keterangan seorang rakan sejenayah tidak menyalahi undang-undang tetapi kes-kes undang-undang mengingatkan tentang bahaya cerita rekaan oleh rakan sejenayah untuk menyalahkan tertuduh.

E **(2)** Tidak selamat untuk bergantung pada keterangan PW1 kerana terdapat dua kelemahan dalam keterangan PW1. Pertama, dalam keterangannya, PW1 menyatakan dia memasuki kereta perayu hanya untuk mengutip 'duit panggu' daripada perayu. Jika begitu, kenapa PW1 perlu masuk ke dalam kereta dan duduk di tempat duduk hadapan dan melakukan F perjalanan dalam kereta bersama-sama perayu? Tambahan lagi, pihak polis tidak merampas 'duit panggu' berjumlah RM450 daripada perayu atau kereta tersebut. Kedua, PW1 memberi keterangan dia bersama-sama dengan Mohd Halim semasa dia memasuki kereta perayu. Penting buat pihak pendakwaan memanggil Mohd Halim ke kandang saksi. G Hakim Mahkamah Tinggi sepatutnya membangkitkan anggapan bertentangan, bawah s. 114(g) AK, terhadap pihak pendakwaan atas kegagalan memanggil Mohd Halim. Hakim Mahkamah Tinggi terkhilaf, berdasarkan undang-undang dan fakta, apabila beliau memutuskan, secara pra-matang, bahawa keterangan Mohd Halim tidak relevan. H Mohd Halim seorang saksi yang sangat penting dan relevan dalam menentukan kebersalahan perayu. Jika Mohd Halim dipanggil, dia boleh memberitahu sama ada bungkusan tersebut ada di dalam tangan PW1 semasa dia memasuki kereta tersebut atau sebaliknya.

(3) Hakim Mahkamah Tinggi melakukan kekhilafan boleh-rayu apabila I beliau bergantung pada keterangan PW1 dalam mensabitkan perayu sedangkan keterangan PW1 sepatutnya dipotong atau tidak termasuk dalam pertimbangan. Jika keterangan PW1 tidak dimasukkan, seluruh

kes pendakwaan akan tumbang dan pertuduhan terhadap perayu tidak boleh kekal. Sabitan tidak selamat. Oleh itu, sabitan dan hukuman Mahkamah Tinggi diketepikan dan perayu dilepaskan dan dibebaskan.

Case(s) referred to:
K Abdul Rasheed v. PP [1985] 1 LNS 54 HC ***(refd)***
Lawrence Masuni & Anor v. PP [2014] 9 CLJ 1038 FC ***(refd)***
Odin Hasbi & Ors v. PP [2000] 8 CLJ 411 HC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(dist)***
PP v. Ku Hang Chua [1975] 1 LNS 131 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 254(3)
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(vi), 37B(1)(b), 39B(1)(a), (2)
Evidence Act 1950, ss. 9, 114(b), (g), 133
Penal Code, ss. 34, 376

For the appellant - M Manoharan; M/s M Manoharan & Co
For the respondent - Mohamed Farizal Mohamed Fedder; DPP

[Editor's note: For the High Court judgment, please see PP v. Mohamed Kanathi Meerah Mydin [2017] 1 LNS 2005 (overruled).]

Reported by Najib Tamby

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] The appellant was charged and tried in the High Court of Malaya at Penang with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable with the mandatory death penalty under s. 39B(2) of the same Act. The charge reads:

> Bahawa kamu pada 20hb September 2014, jam lebih kurang 10.45 malam, di tepi Jalan Gurdwara, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu sejumlah 1,924 gram dadah jenis Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the end of the trial, the appellant was found guilty by the learned High Court Judge ("learned trial judge"). The appellant was convicted and sentenced to suffer the mandatory death penalty as mandated under s. 39B(2) of the Act.

[3] Aggrieved by the conviction and sentence, the appellant appealed to this court. We heard the appeal on 29 October 2018, and after hearing the parties, we unanimously allowed the appellant's appeal. We now give our reasons for allowing the appellant's appeal.

A **The Prosecution's Case**

[4] The factual matrix of the prosecution's case was well encapsulated in the learned trial judge's grounds which may be summarised as follows.

[5] On 20 September 2014 at about 10.45pm, Lance Corporal Syamsul
B Ezzuan bin Muhammad Ayob (PW6) together with his colleague, Lance Corporal Mahadi were carrying out anti-crime patrolling duty in plain clothes on motorcycles. While on duty, PW6 saw a silver Hyundai car bearing registration No. PFC 8004 ('the car') stopping beside the Nusantara Flats at Jalan Makloom, Penang. PW6 saw two people inside the car
C behaving suspiciously.

[6] PW6 and his colleague then approached the car but the car suddenly sped off. PW6 and his colleague chased after the car. In the course of the chase, the car turned into Jalan Gurdwara and collided onto the front of an oncoming Toyota Vios car bearing registration No. PJF 6148 driven by
D Quah Lian Kok (PW5).

[7] Consequent to the collision, the car stopped. PW6 and his colleague identified themselves as policemen to the two occupants in the car. They were later identified as the appellant who was behind the wheels and the passenger seated in front beside him as one Mohd Shariffuddeen bin Noorul
E Ameen (PW1).

[8] PW6 and Lance Corporal Mahadi thereafter detained the appellant and PW1 and conducted a body search on them respectively but nothing incriminating were found on each of them. PW6 then searched inside the car and found a package with coloured decorated wrapping paper with printed
F words "The best my friend" lying on the back seat of the car. Upon searching the said package, PW6 found it to contain two compacted slabs of dried plant materials suspected to be cannabis sealed in transparent plastic. Upon further checking, PW6 recovered a receipt described as "referral form" bearing the appellant's name from the front dashboard of the car.

G

[9] Consequently, both the appellant and PW1 were arrested and together with the drugs exhibit recovered from the car were taken back to Timur Laut Police Headquarters and had them handed over to Inspector Amir Firdaus bin Ismail (PW8) for further action.

H **[10]** Investigation by PW8 revealed that the car is registered in the appellant's name.

[11] On 24 September 2014 at 15.07pm, PW8 sent the two compacted slabs of dried plant materials to the chemist, Teoh Choon Ping (PW4) for analysis. PW4 analysed the two slabs and confirmed that they were cannabis
I with a combined weight of 1,924g. PW4 also confirmed them to be cannabis as defined in s. 2 of the Act. PW4 tendered his report as P20, which can be found at p. 34, appeal record vol. 3.

Findings At The End Of The Prosecution's Case

[12] The learned trial judge had considered and accepted the testimonies of PW4 on the analysis undertaken by the witness before concluding that the two slabs were cannabis with a total weight of 1,924g.

[13] As for the element of possession, the learned trial judge accepted the evidence of PW6 and PW1 which proved the fact that the appellant was in custody and control of the car registered under his name and as such the appellant was in custody and control of the drugs found on the backseat of the car coupled with the conduct of the appellant in hurriedly speeding off. The learned trial judge further invoked the statutory presumption under s. 37(d) of the Act where the appellant shall be deemed to have been in his possession the impugned drugs and to have known the nature of such drug, until the contrary is proved. Therefore, the appellant was held to have been in possession of the impugned drugs.

[14] As to the element of trafficking, the learned trial judge invoked the presumption under s. 37(da)(vi) of the Act since the weight of the drugs involved was more than the minimum weight of 200g of cannabis to trigger the presumption of trafficking under the Act. It is a rebuttable presumption.

[15] After being satisfied that all the elements of the charge had been established, the learned trial judge found that the prosecution had proven a *prima facie* case against the appellant. Thus, the appellant was ordered to enter his defence on the charge preferred.

The Defence

[16] The appellant elected to give evidence under oath. The appellant was the sole witness for the defence. In his defence, the appellant claimed that on the night in question he met PW1 after prayers and PW1 asked for his help to send PW1 to a flat at Jalan Yahudi to hand over a birthday gift to his friend. The appellant saw PW1 brought into his car a package and put it on at the backseat. The appellant said he was tricked by PW1 to ferry and deliver the package that contained the drugs which the appellant did not have any knowledge of. When the police approached them, PW1 alerted him and ordered him to speed off. Whilst being chased by the police, he tried to stop the car but was prevented by PW1 which resulted in the car losing control and ultimately colliding with the other car.

[17] After considering the defence, the learned trial judge found that the appellant had not succeeded in raising a reasonable doubt on the prosecution's case. The learned trial judge found that the defence put up by the appellant that he was an innocent carrier having no knowledge of the impugned drugs could not be believed. The learned trial judge accepted and believed the evidence of PW1 who testified during the prosecution's case that PW1 did not bring into the appellant's car the package containing the impugned drugs.

[18] The learned trial judge did not believe the appellant's defence of an innocent carrier. The learned trial judge also did not believe that the appellant did not have knowledge as regard to the contents of the package as the package was partially unwrapped. Finally, the learned trial judge held that the appellant has failed to rebut the presumption of trafficking invoked pursuant to s. 37(da)(vi) of the Act on the balance of probabilities.

[19] The appellant was thus found guilty and convicted, and sentenced to suffer the mandatory death penalty as mandated under s. 39B(2) of the Act. Hence, the appeal before us.

The Appeal

[20] Before us, learned counsel for the appellant canvassed only one solitary ground for us to allow the appellant's appeal and to set aside the conviction and sentence of the learned trial judge. The only issue argued by learned counsel was that the prosecution relied solely and heavily on the evidence of PW1 to bring home the conviction against the appellant. Likewise, the learned trial judge relied on the evidence of PW1 in holding that the appellant was in possession of the impugned drugs. Learned counsel submitted that the evidence of PW1 should be expunged as PW1's testimony was unreliable and uncorroborated due to the fact that PW1 was an accomplice. Learned counsel relied on two High Court decisions in *PP v. Ku Hang Chua* [1975] 1 LNS 131; [1975] 2 MLJ 99 and *Odin Hasbi & Ors v. PP* [2000] 8 CLJ 411.

Our Decision

[21] The material evidence of PW1 heavily relied upon by the learned trial judge in convicting the appellant was that PW1 went into the appellant's car to collect 'duit panggu' (alms) of RM450 from the appellant. PW1 further said when the police approached them, the appellant sped off and when he asked why, the appellant told him "dalam kereta ada barang". PW1 said he did not bring anything when he entered the appellant's car and his friend by the name Mohd Halim can verify this. PW1 denied any knowledge of the impugned drugs recovered by the police from the backseat of the appellant's car after their arrest.

[22] In his defence, which was clearly in contrast with the testimony of PW1, the appellant's version was that PW1 asked for his help to ferry him to Flat Yahudi for PW1 to hand over a birthday gift to his friend. The appellant said that the package wrapped in birthday wrapper was brought into his car by PW1 and it was subsequently torn by the police when they want to look at what was the thing inside the package.

[23] We observed that the undisputed facts in this appeal was that PW1 was arrested together with the appellant. PW1 in fact was charged together with the appellant as co-accused in respect of the same impugned drugs. Nevertheless, on the first day of the hearing, the learned Deputy Public

Prosecutor ('learned DPP') withdrew the charge against PW1 and asked for him to be discharged not amounting to an acquittal ('DNAA') under s. 254 of the Criminal Procedure Code. Subsequently, on the same day, PW1 was called as the first witness for the prosecution (PW1). Therefore, we agreed with the learned counsel that PW1 was in fact an accomplice and it is trite law that the evidence of an accomplice required corroboration.

[24] Section 114(b) of the Evidence Act 1950, the court may presume until the contrary is proved, that an accomplice is unworthy of credit unless he is corroborated in material particulars. Section 114(b) reads:

> 114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume
>
> (a) ...;
>
> (b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;
>
> (c) ...

[25] The learned trial judge held that the evidence of PW1 had been supported by the appellant's own conduct in speeding off and the conduct of the appellant uttering the words "matilah saya" when the police uncovered the impugned drugs inside the birthday package. We are of the view that the conduct of speeding off had been explained by the appellant. We find that the explanation was probable and admissible under s. 9 of the Evidence Act 1950. As regard to the words spoken by the appellant "matilah saya", it was wrongly admitted by the learned trial judge as it amounted to a confession to which no caution under s. 37B(1)(b) of the Act had been administered before or soon after the words were uttered by the appellant. At that time, the appellant and PW1 were already under police arrest.

[26] We are mindful of s. 133 of the Evidence Act 1950 that a conviction based on the evidence of an accomplice alone is not illegal. Section 133 reads:

> 133. Accomplice
>
> An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[27] Nevertheless, case law had warned of the danger of concocted story by an accomplice to throw the blame on the accused person. We just need to cite a Federal Court case of *Lawrence Masuni & Anor v. PP* [2014] 9 CLJ 1038 at p. 1061:

A [97] As expressed by *Sarkar's Law of Evidence*, (16th edn.) Reprint 2008 at p. 2245:

> … that although uncorroborated testimony of an accomplice is strictly admissible, and a conviction based on it is not illegal, yet experience teaches us that an accomplice being always an infamous
B person, it is extremely unsafe to rely upon his evidence unless it is materially corroborated, and that it is the long established and universal practice both in India and England for judges to guard their minds carefully against acting upon such evidence when uncorroborated. The rule as to corroboration has become a settled rule of practice of so universal an application that it has now
C assumed the force of a rule of law.

[98] It is also significant to add that the said corroborative evidence must also implicate the appellants (whether directly or otherwise) with the crime.

[99] As illustrated in the *locus classicus* on corroborative evidence, ie,
D *R v. Baskerville* [1916] 2 KB 658, it was observed *inter alia* by Lord Reid that:

> … it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it …

E [100] As Lord Hailsham of St Marylebone LC made clear in *R v. Kilbourne* [1973] AC 729 HL, the reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw blame on the accused. The danger is not less, but may be greater, in the case of fellow accomplices. Their joint evidence is not independent in the sense required by *R v. Baskerville (supra)* and a jury must be warned not to treat
F it as corroboration. But this illustrates the danger of mistaking the shadow for the substance.

[28] We emphasised that the appellant's defence was that on the day in question he picked up PW1 who was carrying the birthday package. PW1 placed the package at the backseat of his car and PW1 sat at the front
G passenger seat. The appellant testified that he received a call from PW1 before that incident. PW1 asked to be sent to Flat Jalan Yahudi to deliver the birthday package to a friend which he complied. While at Nusantara flat road, PW1 asked him to speed off when two policemen approached his car. PW1 told him that the package he brought along contained "barang salah" and PW1 asked him to drive at a fast speed to avoid being arrested by the
H police. He could not stop the car as the steering was controlled by PW1.

[29] We observed that the defence version had been put to the witnesses during the prosecution's case. With that, it could not be held that the defence of the appellant was an afterthought. The defence version was put to PW1
I as can be found at pp. 25-27, appeal record, vol. 2:

Manveer Singh : So setuju dengan saya sebelum ini kamu tak pernah nampak OKT bawa kereta ke masjid. Setuju?

SP1 : Saya tak pernah nampak.

Manveer Singh : Saya katakan di sini pada hari itu kamu telah telefon Kanathi untuk ambil duit dan minta dia tolong untuk bawa kamu berjumpa dengan kawan kamu di Relau untuk sambutan hari jadi?

SP1 : Saya tidak setuju.

Manveer Singh : Setuju dengan saya kamu beritahu OKT bahawa motosikal kamu tidak dalam keadaan baik dan kamu minta bantuan untuk membawa kamu ke Relau. Setuju atau tidak?

SP1 : Saya tidak setuju.

Manveer Singh : Saya nyatakan di sini kamu cuba mempergunakan OKT dalam kes ini?

SP1 : Saya tidak setuju.

Manveer Singh : Saya menyatakan kepada kamu tujuan kamu mempergunakan OKT kerana OKT ada kereta dan dengan memperlibatkan kereta orang lain peluang untuk dikesan adalah lebih rendah. Setuju atau tidak?

SP1 : Saya tidak setuju.

Manveer Singh : So kamu mempergunakan OKT untuk menghantar ganja. Setuju atau tidak?

SP1 : Saya tidak setuju.

Manveer Singh : Kamu menipu kepada OKT dengan menggunakan alasan untuk menghantar hadiah hari jadi kepada kawan kamu. Setuju?

SP1 : Saya tak setuju.

Manveer Singh : Dengan sebab itu kamu telah membalut ganja itu dengan pembalut hadiah the title "The best my friend". Setuju atau tidak setuju?

SP1 : Tidak setuju.

Manveer Singh : Saya katakan kamu membalut ganja itu sebab itu kamu tahu bahawa barang itu dalam keadaan berseal.

SP1 : Saya tidak setuju.

Manveer Singh : Pada malam itu semasa dalam kereta apabila kamu nampak polis, kamu yang suruh. Kanathi pecut kereta secara tiba-tiba. Setuju?

SP1 : Saya tidak setuju.

Manveer Singh : Dan disebabkan Kanathi terkejut dia mengikut arahan kamu. Setuju atau tidak setuju?

SP1	:	Saya tidak setuju.
Manveer Singh	:	Saya katakan kepada kamu, kamu jerit dengan cemas dan secara tiba-tiba kamu katakan polis cepat-cepat.
SP1	:	Saya tidak setuju.
Manveer Singh	:	Apabila pecut Kanathi bertanya kepada kamu pecut dan kamu beritahu hadiah yang dibalut itu adalah ganja.
SP1	:	Saya tidak setuju.
Manveer Singh	:	Saya nyatakan di sini apabila Kanathi tahu keadaan ini dia ingin berhenti kereta dan kamu tidak benarkan.
SP1	:	Saya tidak setuju.
Manveer Singh	:	Saya nyatakan kepada kamu memegang stereng kereta dan tidak membenarkan Kanathi berhenti kereta.
SP1	:	Saya tidak setuju.
Manveer Singh	:	Dan disebabkan pergelutan itu kereta telah hilang kawalan dan terlanggar sebuah kereta Vios dan terbabas.
SP1	:	Saya tidak setuju.

[30] The evidence before the learned trial judge as regard to who brought the impugned drugs in the car owned and driven by the appellant is a question of fact to be decided upon the evidence of either the appellant or PW1. The learned trial judge believed and accepted the evidence of PW1 even though the learned trial judge found that PW1 is an accomplice. However, we are of the view that it is not safe to rely on PW1's evidence due to two infirmities in PW1's evidence.

[31] Firstly, it was PW1's testimony that he entered the appellant's car just to get "duit panggu" in the sum of RM450 from the appellant. If it is so, why the need for PW1 to get into the car and sat in the front seat and travelled in the car with the appellant. It is probable that the appellant's version that he was asked by PW1 to be sent to Flat Yahudi to hand over a birthday package to his friend which was later found to contain the impugned drugs was true. Furthermore, the police never recovered the so-called "duit panggu" of RM450 either from PW1 or from the appellant nor from the car.

[32] Secondly, PW1 testified that he was with his friend, Mohd Halim before he entered the appellant's car. PW1 said that he did not bring in anything, not the impugned drugs in the birthday package into the appellant's car and Mohd Halim can confirm this. In examination in-chief, PW1 stated, at pp. 12-13, appeal record, vol. 2:

Lim Cheah Yit DPP	:	OK sebelum encik masuk ke dalam kereta OKT masa itu encik ada bersama kawan-kawan tak atau siapa-siapa yang nampak encik di situ?

SP1 : Kawan saya ada nampak. Semasa saya bersembang dengan dia kawan saya lihat saya dari belakang.

Lim Cheah Yit DPP : Ada kawan lihat encik masuk kereta OKT?

SP1 : Ya. Saya jalan saya letak motor saya dekat belakang kereta dia saya masuk. Saya parking motosikal di belakang kereta dia saya jalan masuk, kawan saya nampak saya.

Lim Cheah Yit DPP : Siapa nama kawan kamu?

SP1 : Kawan saya nama Mohd Halim.

Lim Cheah Yit DPP : Tadi encik kata encik masuk ke tempat penumpang hadapan ya?

SP1 : Ya.

Under cross-examination, PW1 said at pages 32-33, Appeal Record, Volume 2 as follows:

Manveer Singh : Kamu katakan Halim ada nampak kamu masuk ke dalam kereta Kanathi setuju?

SP1 : Saya setuju.

Manveer Singh : Sekiranya kamu tahu kamu tidak bersalah, Halim boleh buktikan bahawa kamu tidak bersalah. Setuju?

SP1 : Ya saya setuju.

Manveer Singh : Boleh bagitahu saya nama penuh En. Halim?

SP1 : Mohd. Halim.

Manveer Singh : Nombor telefon dia?

SP1 : Nombor telefon dia saya tak ingat.

Manveer Singh : Berapa lama kamu kenal Halim?

SP1 : Dalam setahun.

Manveer Singh : So setuju dengan saya bahawa Halim boleh menolong kamu untuk membuktikan kamu tidak bersalah setuju?

SP1 : Ya saya setuju.

Manveer Singh : So sekiranya kenyataan Halim penting mengapa kamu tidak memberitahu kepada perakam. Adakah kamu memberitahu kepada pihak perakam polis tentang Halim?

SP1 : Ya saya beritahu. Dia ambil statement saya.

Manveer Singh : So kamu memberitahu pegawai perakam bahawa Halim ada nampak kamu masuk ke dalam kereta Kanathi. Setuju?

A

SP1	: Ya saya setuju.
Manveer Singh	: Saya nyatakan kepada kamu bahawa cerita kamu adalah rekaan sahaja dan cerita ini adalah untuk melepaskan diri sendiri?
SP1	: Saya tidak setuju.

B

[33] The investigating officer, PW8 under cross-examination revealed that there was a witness who saw PW1 entering the car, but nevertheless all questions put to PW8 regarding this witness (Mohd Halim) were not allowed by the learned trial judge as he found it to be irrelevant. We are of the view that the learned trial judge had misdirected himself in his ruling. The notes of evidence at pp. 112-114, appeal record, vol. 2 disclosed as follows:

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K.W Lee	: Tuan, saya nak tanya tentang kejadian yang berkaitan dengan kes hari ini. Pada tarikh ini lebih kurang pukul 10 ke 1 sebelum pukul 1, saya dimaklumkan oleh Puan DPP dalam kes ini bahawa ada seorang saksi awam. Adakah saksi awam itu ada datang ke mahkamah setahu kamu?

D

SP8	: Boleh ulang soalan?
K.W Lee	: Ok you dengar one step by step. Pada hari ini kami baru dimaklumkan oleh Puan DPP bahawa seorang saksi awam akan hadir dan kamu juga tahu sebab saya difahamkan kamu ada ditugaskan untuk check untuk panggil saksi tersebut. So soalan saya adakah saksi itu hadir di mahkamah atau hadir di bangunan mahkamah?

E

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SP8	: Setuju ada hadir.
K.W Lee	: Tetapi ada penyebab kami semua mahkamah ini tidak kes ini dipanggil semula, kami difahamkan saksi tersebut tidak dipanggil lagi adakah benar? Jadi setujukah atas pernyataan saya ini? Saya katakan sebenarnya saksi ini boleh dijejaki dan ada boleh dipanggil tetapi tidak dipanggil.

G

Hakim	: I think that is a more question of law.
K.W Lee	: Whether maybe he understand.

H

Hakim	: But that is his opinion, he is not the prosecution witness/counsel. So we leave that question out.
K.W Lee	: I will change the question my lord. Maksudnya saksi tersebut pada hari ini ada di bangunan mahkamah tetapi pada hari ini saksi tersebut tidak datang untuk memberi keterangan. Setuju atau tidak?

I

SP8	: Tak faham dia cakap datang lepas itu tak datang.

K.W Lee	: Saksi hari ini memang ada di bangunan mahkamah tetapi finally tidak dipanggil untuk memberi keterangan di mahkamah. Setuju atau tidak?
SP8	: Setuju.
K.W Lee	: Soalan seterusnya, bolehkah kamu memberitahu mahkamah pada hari ini nama saksi tersebut?
Hakim	: I think that is not relevant.
Puan Emma DPP	: Y.A saya percaya yang itu tak relevant.
K.W Lee	: Relevant, Y.A because Puan DPP at first initially bring this witness to the court so at least when we ask who is the witness she wouldn't reveal so since I.O is established that is such a witness so at least we must know the name?
Puan Emma DPP	: Y.A adalah hak pendakwaan untuk sama ada panggil atau tidak saksi tersebut untuk memberi keterangan.
Hakim	: That's right I think I rule that is irrelevant.
Manveer Singh	: Apologies, Y.A. Because he is the last witness and there won't be anymore witnesses called after this. So that's why we want to know who is the witness. Because in the previous En. Shariffuddeen he did mentioned some names who was his friends. He mention about the guy who runs the mosques, the guy who saw him, the few names he mentioned. So we want to know who is that person. At least if that name is mentioned if the name in the our cross that Shariffuddeen gave. It wont damage the prosecution case because it is the end of case, Y.A. So I think by asking the name the cross so he has to answer, Y.A. That is all we want to know.
Hakim	: I rule it is irrelevant. So I mean you all know the names from testimony of Shariffuddeen so we all think in that case I would call for the defence you all cannot recall those people.
Manveer Singh	: Y.A we want to know who is the person.
Hakim	: Ok since they didn't call I rule that is irrelevant.
K.W. Lee	: Adakah saksi yang dikatakan tidak hadir tersebut seorang lelaki atau seorang perempuan?
Hakim	: I think you should not ask the person.

[34] We are constrained to hold that the learned trial judge erred in law and in fact when he prematurely decided the witness Mohd Halim's evidence as irrelevant. In our considered opinion Mohd Halim is a very important and

very relevant witness to this case as this witness if called to give evidence would be able to say whether the birthday package which contained the impugned drugs were in the hands of PW1 before he entered the car driven by the appellant or otherwise. Even PW8 agreed with the suggestion that it is possible that the impugned drugs belong to PW1. At pp. 110-111, appeal record, vol. 2, PW8 said:

Manveer Singh	: Inspektor Amir soalan seterusnya untuk kes ini setuju bahawa Shariffuddeen dengan Kanathi dituduh bersama-sama setuju?
SP8	: Setuju.
Manveer Singh	: So setuju dengan saya ada kemungkinan bahawa dadah yang dijumpai milik Shariffuddeen juga?
SP8	: Pada siasatan saya kemungkinan ada.

[35] Based on the totality of the evidence and circumstances of this case, we have no hesitation to hold that Mohd Halim is a very important witness in determining the guilt of the appellant. Yet, the prosecution did not call Mohd Halim to the stand to tell his version of the issue. Not only that, Mohd Halim was never offered to the defence. As can be seen at p. 116, appeal record, vol. 2, before closing their case, only three witnesses were offered to the defence, that is, Ahmad Mahadi bin Md Saad, Puan Nurul Rifqah binti Shafie and ASP Ahmad Dahuri bin Mohammad Esa. Mohd Halim was not in the list.

[36] In our view, it is incumbent upon the prosecution to have called Mohd Halim to the stand. Failure to do so, the learned trial judge should, to our mind, have invoked the adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution. We are constrained again to hold that the learned trial judge had misdirected himself in law and in fact for non-direction in this matter.

[37] As alluded earlier in our judgment, PW1 was given an order of discharge not amounting to an acquittal (DNAA) by the learned trial judge upon request by the learned DPP under s. 254 of the Criminal Procedure Code ('CPC'). The order of DNAA of SP1 as evinced at pp. 1-2 of the appeal record, vol. 2 showed:

Pn. Emma DPP	: YA sebelum saya memulakan kes ini arahan saya adalah untuk tarik balik pertuduhan ke atas OKT Kedua Mohamed Shariffuddeen bin Noorul Ameen akan dijadikan sebagai saksi pendakwaan. Pertuduhan ke atas OKT Mohamed bin Kanathi akan diteruskan.
RSN Rayer	: YA I thank for the ...

Hakim : Dibenarkan YA. Let me just record first. Prosecution wishes to withdraw charge without amounting to acquitted against the second accused who shall then be a prosecution witness. Accordingly I order that the second accused be discharged and not amounting to acquittal.

[38] For ease of reference, we reproduce s. 254 of the CPC as follows:

> Public Prosecutor may decline to prosecute further at any stage
>
> 254. (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) At any stage of any trial before a Sessions Court or a Magistrate's Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) Such, discharge shall not amount to an acquittal unless the Court so directs.

[39] We observed that even though the learned trial judge had a discretionary power to direct an acquittal under sub-s. 254(3) of the CPC, nevertheless he did not exercise his discretionary power in the instant case. The order of the court remained that PW1 was DNAA of the charge earlier preferred against him by the learned DPP. By an order of DNAA, the charge against PW1 is stayed and there is no bar for the prosecution to rearrest and recharge PW1 at a later stage. There is ample persuasive authority for the proposition that unless some good grounds are shown, it would not be right to leave PW1 saddled with a charge hanging over his head for an indeterminate period. However, PW1 himself did not apply for a discharge amounting to an acquittal (*K Abdul Rasheed v. PP* [1985] 1 LNS 54; [1985] 1 MLJ 193).

[40] As we alluded to earlier, the learned trial judge relied heavily and substantially on the evidence of PW1 in convicting the appellant. We are of the considered view that the learned trial judge had committed an appealable error when he relied on the evidence of PW1 in convicting the appellant when in fact PW1's evidence should be excluded from consideration or expunged. We found support on this proposition from the two cases cited by the appellant's learned counsel. In *PP v. Ku Hang Chua*, *supra*, Yusoff J said at p. 101:

> I have excluded John Lu Su Thiam's (PW4) evidence entirely, though he gave evidence impressively in court which corroborates the complainant's evidence not only in material particular but also in detail: not because he

A is not competent to give evidence being himself an accomplice in the offence. But I consider the fact that the charge against him has been withdrawn by the prosecution at the last moment with the plea that he should not be acquitted and in fact he was not acquitted, gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement is too strong as
B it is coupled with a threat that proceedings would be continued against him at any time by the prosecution, to allow the court to admit his evidence.

In *R v. Pipe* it is adjudged that this practice has become the rule of law. The facts of that case showed that the prosecution called at the trial of
C the appellant an accomplice against whom proceedings had been brought, but had not been concluded. It was held that it was the duty of the prosecution if they were still minded to call the accomplice as a witness, to let it be known that in no event would proceedings against him be continued and as this had not been done, there had been a departure from the established rule of practice.

D In *Regina v. Turner and Others* reported in Times Law Report of March 24, 1975, Lord Justice Lawton is reported to have said while referring to the practice of granting immunity against prosecution or further prosecution that:

> E It was in the public interest that criminals should be brought to justice; and the more serious the crimes the greater was the need for justice to be done. Employing Queen's evidence to accomplish that end was distasteful to judges, lawyers and members of the public.

It is further reported that His Lordship distinguished this practice from
F doubting the well-established practice of calling accomplices on behalf of the Crown who had been charged in the same indictment as the accused and who had pleaded guilty.

[41] In *Odin Hasbi & Ors v. PP*, *supra*, the facts are similar to the instant appeal before us. From the outset, four persons were originally charged for
G an offence of rape punishable under s. 376 of the Penal Code and read together with s. 34 of the same Code. Prior to the commencement of the trial, the prosecution applied for the fourth accused to be discharged not amounting to an acquittal. The said application was granted by the learned Sessions Court Judge, which consequently led the fourth accused to become
H a prosecution witness (PW1). Muhammad Kamil Awang J in a similar sentiment, at p. 415 ruled:

> Coming to the 2nd ground of the 1st appellant's appeal, the learned counsel for the 1st appellant submitted that the learned Sessions Court judge misdirected herself in convicting the 1st appellant by relying on the
I evidence of PW1. As I have explained in earlier part of this judgment, PW1 was originally charged together with the three appellants herein with the same offence. Prior to the trial, application was made by the prosecution to discharge PW1 not amounting to acquittal, thus, enabling

him to become a prosecution witness. In a similar case of this nature, where an accused was charged with rape, the evidence of an accomplice who had been discharged but not acquitted was excluded from the consideration of the court as held in *Public Prosecutor v. Ku Hang Chua* [1975] 2 MLJ 99 at p. 101:

> I have excluded John Lu Su Thiam's (PW4) evidence entirely, though he gave evidence impressively in court which corroborates the complainant's evidence not only in material particular but also in detail; not because he is not competent to give evidence being himself an accomplice in the offence. But I consider the fact that the charge against him has been withdrawn by the prosecution at the last moment with the plea that he should not be acquitted and in fact he was not acquitted, gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement is too strong as it is coupled with a threat that proceedings would be continued against him at any time by the prosecution, to allow the court to admit his evidence.

Concurring with the abovesaid principles as enunciated, I am also of the same sentiment that the evidence of PW1 in the instant case ought to be excluded from the consideration of the learned Sessions Court judge, *albeit*, with or without any warning thereto.

[42] We agreed with learned counsel's submission that if the evidence of PW1 is excluded, the whole case of the prosecution tumbled, and the charge against the appellant could not stand.

[43] One final point we would like to comment on is with regard to paras. 83 and 84 of the learned trial judge grounds of judgment at pp. 87-88 of the appeal record, vol. 1 which we quoted below:

> 83. Be that as it may and in spite that SP1 is an accomplice, I find and hold that this finding does not exculpate the accused in the circumstances herein. They were joint traffickers here.
>
> 84. I am mindful that the acceptance of accomplice evidence is subject to the guidelines laid down in *Sabarudin Non & Ors v. Public Prosecutor (supra).* Even if the testimony of SP1 is discarded as suggested by the defence following *Public Prosecutor v. Ku Hang Chua (supra)*, it is immaterial because there is adequate other independent evidence to convict the accused for trafficking in the Drugs. I did not have to rely on SP1's testimony here and I didn't as a matter of fact. In this regard, the accused were in joint custody and control of the Drugs with SP1 in the Car. The accused knew of the existence and the nature of the Drugs from its open exposed and partially unwrapped condition. He was thus in actual possession of the Drugs. Moreover he was trafficking in the Drugs by transacting in the sale and purchase and/or distribution of the Drugs with SP1. The act of trafficking in the Drugs by the accused is corroborated by the conduct

A when he sped off in the Car and continued speeding in it while being chased by the police as well as his subsequent own oral admission that he uttered "Matilah saya!" upon eventual capture and arrest by the police. Put together, the accused is damned. The facts here are in my opinion even more damning upon the accused than that in *Public Prosecutor v. Abdul Rahman bin Akif (supra)*.

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[44] We observed that the learned trial judge decision that without the evidence of PW1 he relied on other independent evidence to which we find earlier in our judgment that those evidence were not admissible and unreliable. It was wrong for the learned trial judge to equate the appellant's case with that of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 which is distinguishable based on the facts of that case. In that case, the accused was all alone in the car driven by him when the drugs were found hidden under the driver's and the front passenger's seat. How could the learned trial judge rely on the decision of the case when the facts of the case are materially different.

C

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Conclusion

[45] For the reasons above-stated, we held that there were merits in the appeal. We found the conviction to be unsafe. Therefore, we allowed the appellant's appeal. The conviction and sentence of the High Court were set aside and the appellant was acquitted and discharged forthwith.

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